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In The

Supreme Court of the United States

October Term, 1995

KATHY DOOLEY, Individually and as Administratrix of the Estate of Bruce Dooley, Deceased, and as Next Friend of Isaac Dooley and Dawn Dooley,

Petitioners,

v.

INTERNATIONAL SAFETY INSTRUMENTS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY

JOHN ARTHUR EAVES
JOHN ARTHUR EAVES, JR.
WILLIAM BOBBY GILL, III
101 North State Street
Jackson, Mississippi 39201
601/355-7961

HUGH P. LAMBERT
LINDA J. NELSON
LAMBERT & NELSON
701 Magazine Street
New Orleans, Louisiana 70130
504/581-1750

T. JACKSON LYONS
Standard Life Building
206 West Pearl Street
Jackson, Mississippi 39201
601/352-0330
Facsimile 601/969-1402
E-mail: legalres@teclink.net
MSB #8988
Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONSE TO FACT STATEMENT

For the Court's convenience, the Petitioner will be referred to as "Mrs. Dooley" and the Respondent as "ISI." ISI begins with the statement that "[t]his case involves an unexplained and ultimately unexplainable industrial accident." ISI's brief at 1. ISI's fact statement concludes with the forceful asseveration "[t]he conclusion is unavoidable that Dooley was attempting to wear the ELSA-5 without activating it, in the apparent belief that he would have time to do so if he detected the presence of gas." ISI's brief at 5. Between these two contradictory statements facts get lost.

This case involves an approximately twenty-five foot fall causing the death of a refinery worker, Bruce Dooley, while he was using ISI's respirator. ISI posits that Mrs. Dooley's case requires two "speculative steps." Respondent's brief at 2. First, ISI insists, the proof of the "immediate cause of the fall" is not susceptible of reliable proof sufficient to create a *prima facie* case. ISI's brief at 2.

In explaining how this is so, ISI makes much of the "undisputed misuse" of the ELSA-5 breathing apparatus at the time of Dooley's death. ISI's brief at 2. How this reflects on the alleged failure of proof is not stated. However, Mrs. Dooley has never conceded that Bruce was misusing the apparatus. What is undisputed is that his supervisor, Mr. Cemore "Buddy" Abney, thought the ELSA a "piece of junk" (R. 498, 1472), and told Bruce to use a different respirator.

The logical connection ISI oddly fails to make is that a "misuse defense" necessarily assumes that the plaintiff

claims the product, as "misused," caused injuries. Without causation, there is no defense necessary. Mrs. Dooley alleges that her husband died because of ISI's failure to design a protected airway from the compressed-air tank to the mask. Mrs. Dooley does not claim that he died from entering an atmosphere where the ELSA failed as a protective device.

ISI asserts that Mr. Jeff Scott, Dooley's "buddy" on the job, "did not see Dooley open the air valve and did not know whether the unit was on or off when Dooley started up the ladder." ISI's brief at 3. In a tape-recorded interview with Chevron officials immediately following the accident, Jeff Scott unequivocally stated that he saw Dooley turn on the device. (R. 503, 1474) Because of the procedural posture of the case, any contradictory statement made by Scott later must be regarded as merely a disputed fact for presentation to the jury. The post-accident interview also makes clear that Scott never saw Dooley turn off the unit.

ISI's factual rehearsal implies that Dooley performed his job and started back down the ladder. ISI's brief at 3. In fact, what first alerted Jeff Scott that something was wrong was Dooley's premature reappearance atop the ladder. (R. 1475) Based on Scott's interview just after the accident, a reasonable inference from the fact that Bruce only spent a few seconds atop the scaffolding and then became rubbery-legged attempting to descend the ladder is that he either had been poisoned or his only source of fresh air was not working.

Mrs. Dooley's second improper "speculative step" appears to be the chain of reasoning connecting Dooley's

fall with the ELSA. ISI is understandably not eager to report that its own expert opined that Dooley fell because he had become hypoxic. (R. 304) This opinion was based on several facts: 1) the eyewitness reports that Dooley fell leadenly after his first few wobbly steps; 2) the post-mortem examination's failure to reveal another physical cause; and 3) Chevron's own tests which showed that when the air bag is worn with the air off, the oxygen percentage in the bag drops rapidly.

Because air flowed from the device in tests conducted by Chevron immediately after the accident and later, all of which were videotaped and available to the parties, Mrs. Dooley's expert mechanical engineer, Fred Liebkeman, believed that a hypoxic condition could only result from the hose constricting the flow. Liebkeman of course assumed that Scott was accurately reporting that Dooley turned on the device. ISI avers in its brief at 4 that Liebkeman's opinion was somehow impeached or unreliable because he neither inspected nor tested the ELSA-5. This statement is a canard. Liebkeman had available to him both exemplar units as well as the actual unit worn by Dooley. (R. 203, 1621) He also had available Chevron's testing via videotape, the transcript of Jeff Scott's interview, and other Chevron reports, including its final report which also concluded that Dooley fell after becoming hypoxic.

ISI also says that Mrs. Dooley "speculate(s) further that when Dooley recognized he was not getting enough air, he mistakenly turned the air off altogether." ISI's brief at 4. After the accident, the ELSA Dooley wore was found turned off. Mrs. Dooley's expert, Fred Liebkeman, believed wholly absurd the notion that an experienced

(17 years) refinery worker would ascend thirty feet expecting to stay some minutes on a platform with his respirator turned off. (R. 1619) Hence, Liebkeman said that if Dooley had turned off the unit, it could only have been while on the platform, out of Jeff Scott's line of sight. The point, which should not be lost, is that the time between the earliest point Dooley could have turned the ELSA off and the point he became groggy was too short for Dooley's purported action to have caused his condition. If Dooley turned off the unit, Liebkeman opined that he would have done so attempting to restore the airflow. (R. 1611-14)

ISI asserts Mrs. Dooley's theory that the hose crimped against the air flow restrictor is "impossible to reconcile with the undisputed fact that the ELSA-5 was found to be fully charged after the accident, indicating it had never been turned on for more than a few seconds." ISI's brief at 5. Since Dooley was on the scaffolding only a very short time, Mrs. Dooley's theory of the air flow being constricted is entirely consistent with the ELSA's containing most of its air. The point, of course, is that based on the facts and the procedural posture of the case, this determination is for the jury.

RESPONSE TO LEGAL DISCUSSION

ISI argues that because Mississippi's summary judgment rule is substantially identical to, and modelled upon, the federal rule, then the standard for determining whether a jury question has been made out must be the same. ISI's brief at 6-8. ISI does not bother to explain the

reasoning behind its conclusion. Neither Mississippi's Rule 56 nor the federal rule say anything about the sufficiency of evidence to present a jury question, which is the issue here.

In ISI's discussion of the Fifth Circuit's *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), it avers that Mrs. Dooley's discussion of that case's effective overruling of *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), is irrelevant to this case. The reasons appear to be two; the first is since Mississippi's rule and the federal rule are construed substantially identically, "whatever else *Shipman* may have done, it plainly could not have created, nor can it now represent a divergence in the (state and federal) summary judgment procedures." ISI's brief at 8-9. The fact remains that *Shipman* was designed to announce a standard for sending cases to juries which was a higher standard than that announced in *Lavender*.

The second reason advanced by ISI for *Shipman*'s irrelevance to our discussion is that it "dealt . . . with the standard of review for jury verdicts." ISI's brief at 9. This is not quite accurate: *Shipman* stated a standard for the judge to use in deciding whether sufficient evidence had been presented to submit a case to the jury. ISI also is unaware that a sufficiency determination for directed verdicts mirrors that of Rule 56. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

As discussed in Mrs. Dooley's Petition, implicit in deciding *Lavender*'s status is the question of whether a state's treatment of inferential evidence is substantive and therefore must be accorded the status of a decisional

rule. That determination involves taking into account areas of law, such as antitrust, which treat inferential evidence as being bound up with the substantive rules governing the body of law.

In this case, Mrs. Dooley reasons that Mississippi treats circumstantial evidence in appropriate products liability cases as analogous to the treatment of circumstantial evidence in cases where *res ipsa loquitur* is applied. This analysis assumes Mrs. Dooley is correct, based on the procedural posture of the case, that she has made out a case which shows that her husband did no more than use the device in a foreseeable manner. There is no credible evidence indicating that Dooley did anything but turn the unit on, climb twenty-five feet, and shortly lose control of his faculties. There is no evidence that the air-tank was contaminated; there is no evidence that other toxins were present; there is no evidence that Bruce suffered some physical ailment which caused him to pass out. Mrs. Dooley has effectively eliminated other causes of her husband's fall than some malfunction of the device providing his only source of air.

Under Mississippi law, the burden of production shifts to ISI to come forward with credible evidence showing some other cause. ISI refers to this as "an extreme view of *res ipsa loquitur*." ISI's brief at 10. Certainly, ISI's opinion has the good company of Justice Walker's dissent in *Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves*, 486 So.2d 374 (Miss. 1986). Walker veritably howled his disagreement with recognizing *res ipsa* burden-shifting principles in products liability law. *Id.* at 388-91. Nonetheless, Walker's three-judge dissent does not speak with the voice of the State.

ISI says, in its discussion of *Daniels v. GNB, Inc.*, 629 So.2d 595 (Miss. 1993), that "the product (in the *Daniels* case), a new car battery, obviously malfunctioned: it exploded. . . . The eyewitness testimony of the injured plaintiff was sufficient to eliminate explanations for the explosion other than a defect in the battery." ISI's brief at 10-11. Aside from the novelty of insurance defense counsel saying that a battery explosion is necessarily a malfunction caused by product defect, these statements are inaccurate. *Daniels*, like this case, was up on summary judgment. The Supreme Court of Mississippi made no such factual findings. Rather, the Court shifted to GNB the burden of producing evidence showing some other cause. *Id.* at 603.

GNB theorized that because Daniels had "hopped-up" the engine and rebuilt the starter and alternator that the battery became "overcharged" and exploded. The Supreme Court of Mississippi said – and this is *all* that it said – the parties' evidence created a genuine issue of material fact on causation for the jury to resolve. *Id.* at 603.

ISI claims Mrs. Dooley argues that Mississippi law shifts the burden of proof. ISI's brief at 11. This statement is false. Mrs. Dooley merely recites Mississippi law which shifts burdens of production in cases turning on circumstantial evidence where the plaintiff's evidence makes out a *prima facie* case. Mrs. Dooley's petition at 13-19.

ISI also faults Mrs. Dooley for failing to discuss law not applicable to this case. ISI's brief at 11. ISI is correct

that Mississippi's legislature has enacted a products liability statute, not applicable to this case, designed to freeze some aspects of Mississippi's common law. Miss. Code Ann. § 11-1-63 (Supp. 1996). ISI makes no effort to discuss how this statute affects this case. This writer's opinion, which is all that may be offered since the Supreme Court of Mississippi has not yet applied the statute, is that it reinstitutes assumption of risk as a complete defense, Miss. Code Ann. § 11-1-63(d). And in warning cases, the statute reestablishes a complete "open and obvious" defense. Miss. Code Ann. § 11-1-63(e).

The new law also appears to reverse Mississippi's adoption of the "risk-utility" analysis for product defects in favor of the "consumer expectations" analysis. Miss. Code Ann. §§ 11-1-63(b), (c)(i) and (c)(ii). However, in design defect cases, like this one, the new statute imposes a risk-utility analysis:

> The product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible design alternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

Miss. Code Ann. § 11-1-63(f)(ii).

Consequently, far from being "obsolete," ISI's brief at 12, the cases developed under Mississippi's design defect law remain good law. There is no reason to believe that Mississippi law in circumstantial evidence cases will not remain the law since evidence rules are not addressed by the new statute. However, the point of a petition to this

Court is to bring to the Court's attention cases where rules of law are involved which meet an "importance" requirement, usually of federal stature.

Thus, this case is not concerned with the elements, statutory or common law, which one must prove in order to recover. Rather, the case considers whether rules governing circumstantial evidence, under the proper legal elements, are of a nature to bind a federal court under *Erie*. ISI misses the point when it suggests that the Court would be "wast(ing) its time" on Mississippi products liability law. ISI's brief at 12.

ISI contends that Mrs. Dooley is "unhappy with the judicial temperament of the judges of the Fifth Circuit, whose independence of mind is plainly not to petitioners' liking." ISI's brief at 8. Mrs. Dooley is in good company: Judges Clark, King, Reavley, Johnson, and Wiener were also displeased with the judicial temperament of the *per curiam* in *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. den.* 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992). This case has parallel features: if *Erie*'s federalism still means anything, it means that federal judges have no "independence of mind" where the fundamental policy of a state is at issue.

Products liability cases have become lightning rods; this is a good thing because it focusses attention on policy choices. The example given in Mrs. Dooley's Petition is telling: Learned Hand and Charles Clark believed that the policy choices underlying *International News Service v. Associated Press*, 248 U.S. 215 (1918), could not survive the economic realities of the Great Depression. Consequently,

to use Judge Clark's words, the Second Circuit "conquered the News case" *sub silentio* time and again.

Whether this Court – or any other – chooses to deal with economic policy issues publicly or as part of the Court's secret deliberations, the question still remains whether, in a federal system of coeval sovereigns, with a national sovereign of limited power, the federal courts should be making those choices. Mrs. Dooley respectfully suggests that carefully guarding the interdependent operation of the governments of the United States is a more important policy than whether a particular company or its insurers should be subject to the risk of an unfavorable jury verdict.

Respectfully submitted,

JOHN ARTHUR EAVES
JOHN ARTHUR EAVES, JR.
WILLIAM BOBBY GILL, III
101 North State Street
Jackson, Mississippi 39201
601/355-7961

HUGH P. LAMBERT
LINDA J. NELSON
LAMBERT & NELSON
701 Magazine Street
New Orleans, Louisiana 70130
504/581-1750

T. JACKSON LYONS
Standard Life Building
206 West Pearl Street
Jackson, Mississippi 39201
601/352-0330
Facsimile 601/969-1402
E-mail: legalres@teclink.net
MSB #8988
Counsel of Record for Petitioners